

Award. Claimant agrees that he is entitled to a 77 percent work disability but contends the award's calculations are wrong. Claimant further contended the SALJ failed to decide the issues of medical mileage, per diem and future medical, all of which were made issues in this case. The only issue listed in the appeal of the Nunc Pro Tunc Award of July 9, 2012, is whether claimant is entitled to medical mileage. As noted above, the parties have now resolved the issues of medical mileage and per diem expenses.

Respondent agrees with claimant that the SALJ erred in calculating claimant's nature and extent of disability in the Award of June 13, 2012. However, respondent argues that the task list prepared by Richard Santner contained duplicate tasks and, therefore, claimant's task loss is actually 48 percent rather than 54 percent, and, accordingly, claimant's work disability is 74 percent rather than 77 percent.

The issues for the Board's review are:

- (1) Is claimant entitled to an order for future medical?
- (2) Does the task list prepared by Richard Santner contain duplicated tasks? If so, should Dr. Amundson's task loss opinion be adjusted?
- (3) Did the SALJ make an error in calculating claimant's permanent partial disability in the June 13, 2012, Award? If so, was this error corrected in the SALJ's Nunc Pro Tunc Award of July 9, 2012?
- (4) Should the SALJ's Nunc Pro Tunc Award dated July 9, 2012, be considered by the Board?

FINDINGS OF FACT

Claimant began working for respondent in the summer of 2009 as a sales associate. Her job duties included unloading trucks, stocking shelves, helping customers, running the register, and cleaning. On Saturday, October 31, 2009, claimant was unloading merchandise from containers on a cart and putting the merchandise on shelves. After working awhile, claimant began having low back pain in her buttocks area. Around 7 p.m., claimant complained about the pain to her supervisor, Sara Moser. Claimant said she did not suffer one specific acute event or incident. She was just unloading merchandise and helping customers. On November 2, 2009, claimant called in to respondent, saying she was unable to work. This information was confirmed by Ms. Moser in a deposition taken in May 2010.

Claimant was terminated in December 2009. She has not worked since October 31, 2009, although she said she had looked for work. Claimant said in her job search, she has talked to managers at convenience stores and Dollar Tree. She had not actually filled out any job applications.

Dr. Glenn Amundson, a board certified orthopedic surgeon, was eventually authorized by respondent to evaluate and treat claimant. He first saw her on March 10, 2010, with a chief complaint of bilateral buttocks and leg pain. Dr. Amundson sent claimant for an MRI, and the MRI suggested lateral recess stenosis at L4-5 and L5-S1. He initially treated claimant conservatively with medication, physical therapy and epidural steroids, but those treatments were not successful. On November 29, 2010, Dr. Amundson performed bilateral laminotomies with decompression of the L4-5 and L5-S1 levels. Claimant was sent to physical therapy in February 2011. Dr. Amundson sent claimant for a functional capacity evaluation (FCE) in April 2011. The FCE showed she functioned at a light physical demand level.

Claimant's last appointment with Dr. Amundson before his deposition was May 17, 2011. At that time, Dr. Amundson believed claimant had reached maximum medical improvement. Based on the *AMA Guides*,¹ Dr. Amundson placed claimant in DRE Lumbosacral Category III for a 10 percent permanent partial impairment of the whole body.

Dr. Amundson recommended that claimant limit her occasional lifting to no more than 20 pounds. Further, he recommended she sit, bend, squat, reach, stand and walk on an occasional basis. Kneeling and climbing should be performed minimally, and sitting could be performed frequently. Twisting should be avoided. Dr. Amundson considered the restrictions to be permanent. Dr. Amundson reviewed the task list prepared by Dick Santner. Of the 37 tasks on the list, he opined that claimant was unable to perform 20 for a 54 percent task loss.

Dick Santner, a vocational rehabilitation counselor, evaluated claimant on June 27, 2011, at the request of claimant's attorney. He compiled a list of 37 tasks that claimant performed in the 15-year period before her accident. Claimant was not working at the time of the evaluation.

Mr. Santner's task No. 3 involved stocking and facing shelves. Task No. 12 was to stock shelves. Mr. Santner said the reason those were not duplicative tasks was because of the weights claimant was working with. In No. 3, she lifted 10 to 20 pounds, 20 pounds occasionally. In No. 12, she was lifting 40 to 50 pounds. Mr. Santner said he broke the tasks down as he did because No. 3 would have been a light physical demand task by Dictionary of Occupational Titles (DOT) standards, whereas No. 12 would be a medium physical demand task.

Task No. 3 was cleaning, including sweeping, wet mopping, dusting and emptying trash. Task No. 14 was cleaning, including vacuuming, dusting and mopping. Mr. Santner said the reason for the separate tasks was that No. 5 involved lifting 50 to 60 pounds

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

occasionally and 14 involved only lifting 10 to 12 pounds. Task No. 15 was emptying the trash. Mr. Santner stated that in No. 5, cleaning was a minor part of the job. When working for Jen's Janitorial, (Nos. 14 & 15) claimant was cleaning a variety of different things, so he broke it down further. Mr. Santner stated that emptying trash was only a component of the broader task of cleaning (No. 5) when she worked at respondent. However, at Jen's Janitorial, when she was doing custodial or janitor work, emptying trash was a separate and unique task.

When asked why No. 28, clean up, including sweeping, mopping and emptying trash, was not a duplicate task with No. 5, Mr. Santner stated the weight was different, with one weight being 25 to 50 pounds and the other 50 to 60 pounds. Also there was a difference in time, 30 minutes compared to 2 hours. Mr. Santner said the tasks were performing the same activities but with weight differences and time differences.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of

the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 2009 Supp. 44-510h(a) states:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

K.S.A. 2009 Supp. 44-510k(a) states in part: "At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment."

ANALYSIS

An ALJ does not lose jurisdiction to issue a Nunc Pro Tunc after an award has been appealed so long as it is issued before the Board enters its order on the appeal. But in any event, as the Board's review is de novo, this issue makes no difference in this appeal. The Board agrees with and adopts the findings and conclusions made by the SALJ in his Nunc Pro Tunc Award.

Claimant reviewed the task list prepared by Mr. Santner and pronounced it accurate. Respondent's objection to the task list is not that the tasks are factually inaccurate but that certain tasks are duplicative and should have been combined. Mr. Santner explained why he separated those tasks. His explanation is reasonable. There is no contrary opinion by a vocational expert or any evidence that the tasks should be treated differently. The Kansas Workers Compensation Act does not define a task. While there are many ways to differentiate tasks, the methodology employed by Mr. Santner is grounded in the DOT, an accepted treatise in the industry. The Board finds Mr. Santner's task list to be reasonable and its use by Dr. Amundson was appropriate. Claimant has lost the ability to perform 20 of the 37 tasks listed. As such, claimant's task loss is 54 percent.

Claimant's date of accident was October 31, 2009. Therefore, claimant's entitlement to future medical treatment is controlled by the law in effect on that date. The award of future medical upon application to and approved by the Director pursuant to K.S.A. 2009 Supp. 44-510k as set forth in the Award and Nunc Pro Tunc Award is affirmed.

CONCLUSION

(1) Claimant is entitled to an award for future medical treatment upon application to and approval by the Director.

(2) The task list prepared by Richard Santner is approved and the task loss opinion by Dr. Amundson utilizing that task list is adopted.

(3) The SALJ's calculation of the disability award in the Nunc Pro Tunc Award is correct.

(4) The SALJ's Nunc Pro Tunc Award is considered by the Board.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that Special Administrative Law Judge Gregory A. Lee's Award dated June 13, 2012, as modified by the Nunc Pro Tunc Award dated July 9, 2012, is modified to clarify that claimant is entitled to future medical and an award for mileage expenses and per diem as per the agreement of the parties, but is otherwise affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2012.

BOARD MEMBER

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